

Payments to Leisure Contractors during Covid-19 Westminster City Council v Sports and Leisure Management [2021] EWHC 98 (TCC)

To: All Chief Executives, Main Contacts and APSE Contacts

Key Points

- Council's only liability to their leisure contractor due to 'Specific change of law' is the management fee.
- Further payments are a matter for negotiation between parties and are not open ended.
- The outcome is not necessarily that the Contractor is "no worse off"; nor that the Contractor bears all the losses from the Specific Change in Law.

1.0 Background

On 20th March 2020, the Government required all leisure facilities to close as a response to the rising threat from Covid-19. The implications for this were felt across local authority leisure as income all but dried up, whilst outgoings including staff costs remained. All provision whether in-house or contracted out became loss making.

Several Contractors argued that the imposed restrictions on Leisure operations were a 'Specific change in Law' as defined in some of the contracts which had themselves been derived from the standard Sport England contract, although the term is noticeably absent or ill-defined in most. If the 'Specific Change of Law' were accepted, then it was argued that the Council bore much of the risk and therefore should make compensation payments to the contractor.

SLM argued that the contract required the council to bear the full cost of the 'Specific Change in Law' meaning that "the Contractor should not be worse off" than it would have been if the regulations had not been imposed. The council argued that its maximum exposure to the Specific Change in Law was that the concession payment ("Management Fee") it ordinarily receives from SLM is reduced to zero – and it was not required to make any further payment to SLM.

Westminster had in fact already waived the management fee it normally received from SLM and had made two additional payments towards staff wage costs in April and July 2020, but could not reach agreement with SLM on the balance of risk moving forward.

In order to resolve the disagreement, the council issued a Part 8 claim asking the Court for a declaration of the meaning and effect of the relevant contractual clauses.

2.0 Judgment

The judgement focused on the correct interpretation of the contractual drafting. Justice Kerr noted that while the contract may have been based on the Sport England suite of template contracts for leisure centres it had been drafted and negotiated with the help of legal professionals and so needed to be interpreted on its own merits – without influence from any "industry standard" positions contained in the Sport England precedent.

Accordingly the Court found as follows:

1. "A Specific Change in Law requires the parties to operate the "Authority Change" process, adapted so that it addresses the Specific Change in Law and cannot be withdrawn.
2. The outcome of that process is determined by agreement between the parties acting reasonably or as determined under the dispute resolution procedure; the outcome is not necessarily that the Contractor is "no worse off"; nor that the Contractor bears all the losses from the Specific Change in Law.
3. The financial consequences of a Specific Change in Law cannot include Management Fee becoming payable to the Contractor instead of vice versa; the Management Fee cannot be less than zero for any contract year.
4. The financial consequences of a Specific Change in Law can include reduction of the Management Fee as far as (but not below) zero and can include payment of a lump sum by the Council to the Contractor."

Two point of previous contract case law are relevant:

- Wood v. Capita Insurance Services Ltd [2017] AC 1177 – noting the need to balance "textualism" and "contextualism" when determining the intent of a contract. Both the contract's text and its context can play a part in interpretation.
- The contra proferentem principle (which states that "a person who puts forward the wording of a proposed agreement may be assumed to have looked after his own interests, so that if the words leave room for doubt about whether he is intended to have a particular benefit there is reason to suppose that he is not") is a "principle of last resort"

3.0 Significance / APSE Comment

Many local authorities have faced similar, sometimes robust, requests for financial assistance from their leisure contractors over the past year. Most have taken a pragmatic view of about the short to medium term future and have assisted rather than deal with contract failure during a pandemic.

Many of these payments have been substantial and unsustainable, especially for smaller district authorities.

Several close to the end of contract have taken the decision to return the service in-house allowing the Authority to have better control over the ongoing situation. Some have sought 'independent' consultancy support for an options appraisal and APSE has been shocked by the level of exaggerated costs attributed to in-house and Trust options. Having collected data on the costs of running leisure facilities for over 21 years through APSE Performance Networks, we believe we hold the most comprehensive historical financial data on leisure centres in the UK and it bears no relation to some of the costs we have seen suggested in various appraisals.

The effects of the pandemic on leisure are likely to last for at least another 18 months. Social distancing requirements and public anxiety will continue to suppress visitor numbers and operators will need to rebuild their membership base for gyms and swimming. It is likely to be the 2022-23 financial year before anything approaching financial stability returns. This also means that contractors will not be operating a surplus and many will continue to make demands for additional payments.

The case therefore provides local authorities with added reassurance that their leisure contracts are in most cases 'adjustable and only a starting point for negotiation' rather than an obligation to cover contractor losses.

APSE is separately undertaking a study, in collaboration with the LGA and CLOA, on the future of Local Authority Leisure. Details are available on the apse website www.apse.org.uk or following this [link](#)

Rob Bailey
Principal Advisor